86-910

CASE NO.

in the

Supreme Court

of the

United States

OCTOBER TERM 1986

EXPORTADORA COLOMBIANA DE EMERALDAS CO., LTD. and JOSE TOMAS VARGAS ORTIZ,
Petitioners,

vs.

$630,000.00 in U.S. Currency, and UNITED STATES OF AMERICA,
Respondents.

9TH CIRCUIT C.A. NO. 85-5541
DISTRICT COURT (C.D.Ca.) NO. CV83-7988

On Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I.

WHETHER THE OPINION OF THE NINTH CIRCUIT COURT OF APPEALS EXPRESSLY AND IMPROPERLY CONFLICTS WITH THAT OF THE FIFTH CIRCUIT COURT OF APPEALS ON THE APPROPRIATE APPLICATION OF THE PROBABLE CAUSE STANDARD TO DETERMINE THE REASONABLENESS OF THE BELIEF THAT A SUBSTANTIAL CONNECTION EXISTED BETWEEN THE SEIZED MONEY AND ITS ALLEGED EXCHANGE FOR A CONTROLLED SUBSTANCE WHERE NO DRUGS, PARAPHERNALIA OR OTHER EVIDENCE OF A CRIME WAS FOUND?

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REPORT OF COURT'S OPINION

The opinion of the Ninth Circuit was issued as an unreported memorandum decision and is attached hereto at App. 1-5.

STATEMENT OF GROUNDS FOR JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was originally filed and entered on June 19th, 1986. A petition for re-hearing and re-hearing en banc was denied on October 21st, 1986. This court has jurisdiction to review this decision by certiorari pursuant to 28 U.S.C. §1254.

No court has certified to the Attorney General that the constitutionality of an act of Congress is in question.

STATUTORY PROVISIONS

The following is a verbatim transcription of the applicable statutory provisions involved in this case:

19 U.S.C. §1615:

§1615. BURDEN OF PROOF IN FORFEITURE PROCEEDINGS

In all suits or actions (other than those arising under §1592 of this title) brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage because of violation of any such law, the burden of proof shall be upon the defendant: Provided, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, . . .

21 U.S.C. §881(a), (b), (d):

Property Subject

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

* * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or ommission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Seizure Pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims

(b) Any property subject to forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

* * *

Other Laws and Proceedings Applicable

(d) The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures

and forfeitures incurred, or alleged to have been incurred, under the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

STATEMENT OF THE CASE AND FACTS

The parties to this petition will be referred to as Petitioners and Respondents U.S.A. and $630,000.00 in U.S. Currency. Petitioners were the Claimants in the Trial Court and Respondent U.S.A. was the Plaintiff. The three volumes of transcripts will be referred to as T. I, T. II, T. III. All reference to the appendix attached hereto shall be by the designation "App.".

a. STATEMENT OF THE CASE

Respondent, U.S.A. filed a Complaint requesting a final determination of the forfeiture of the subject res in the amount of $630,000.00 in U.S. Currency. This Complaint was based upon a claim under 21 U.S.C. §881 indicating that the currency was furnished or intended to be furnished in exchange for a controlled substance; was proceeds that were traceable to such an exchange and/or was used or intended to be used to facilitate a violation of that sub-chapter.

Petitioners filed their Notice of Claims as well as an Answer to the Complaint. These claims and answers essentially indicated the Petitioners/Claimants were the rightful owners of the currency and that the res was not in any manner connected with a narcotics violation.

After the presentation of Respondent USA's case at trial, Petitioners moved for the entry of a directed verdict in their favor. T. II, 124-129. The Trial Court denied Petitioners' Motion for Directed Verdict and made a determination that the Respondent USA had

met its burden of probable cause, thereby shifting the burden to Petitioners to prove that the subject res was not forfeitable. T. II, 130.

After the entry of a jury verdict in favor of Respondent USA the Court entered Judgment in favor of Respondent forfeiting the $630,000.00 in U.S. Currency to the Government.

An appeal to the Ninth Circuit Court of Appeals followed and that Court affirmed the action of the lower court in the Memorandum decision attached hereto. App. 1-5.

After submission of the action to the Ninth Circuit, but before the memorandum decision was issued, the decision in *United States vs. $38,600.00 in U.S. Currency,* 784 F. 2d 694 (5th Cir. 1986) was rendered. *$38,600.00* was a case directly on point prohibiting forfeiture in cases such as the instant one. However, although Petitioners brought this case to the attention of the Ninth Circuit by a notice of supplementary authority, and by a petition for rehearing, the Ninth Circuit did not even attempt to distinguish or even mention *$38,600.00, supra.* This petition follows.

b. STATEMENT OF FACTS

In support of Respondent USA's efforts to establish probable cause to institute a forfeiture Respondent USA presented the testimony of various law enforcement officers. Detective Michael Ferrant testified as to what he considered to be characteristics indicative of drug couriers. T. I, 23-25. Detective Ferrant further indicated

that this set of characteristics was something which was created on his own as opposed to through narcotics training. T. I, 22.

Ferrant indicated that he was on duty as a plain clothes officer assigned to the airport detail on October 18th, 1983, watching arriving passengers on a flight from Miami to L.A. T. I, 26-27. Ferrant saw two individuals, Campos and Palomino, approach a ticket counter at the airport. T. I, 28. Ferrant said that these two individuals appeared Latin and that they were apparently holding a round trip ticket leaving back to Miami later that night. T. 29. The woman, Palomino, did not appear to be heavy or pregnant and had her blouse tucked in at the waist. Additionally, the parties were carrying very little luggage. T. I, 32-33. Ferrant testified that it was his conclusion that the Officers should wait for the outbound flight since the actions of Campos and Palomino were consistent with the transportation of narcotics. T. I, 34-35.

When Ferrant saw the individuals later that night, at approximately 11:15 P.M., Campos and Palomino had on different clothes. T. I, 35-36. Campos had a shirt which was hanging out and Palomino had on a maternity dress and appeared pregnant. T. I, 36-37. These individuals were then stopped prior to boarding their plane and were questioned at length without being provided with any Miranda warnings. T. I, 37-38. Campos and Palomino were completely cooperative with the officers and freely consented to a search of a hand bag in which the officers found a portion of the currency. T. I, 40-41. When Campos was asked who the money belonged to, Campos informed the officer that it belonged to the Company. T. I, 42.

After walking approximately 5 minutes away to the Agents office (T. I, 43), Campos agreed to open his shirt in order to reveal to the Police Officers numerous bundles of money tucked into elastic around his waist area. T. I, 45-47. A search of Palomino also disclosed bundles of money tucked under an elastic band around her waist area. T. I, 48-49. Ferrant indicated that it was his opinion that this money came from narcotics sales. T. I, 50-52.

Campos informed the officers that there was $630,000.00 being held by the two of them. The officers counted out this amount. T. I, 53-54. After conducting the count, the officers gave a receipt for the money to Campos. T. I, 55.

At the time the officers stopped Campos and Palomino, they had no prior information about these individuals and they were not the subject of any type of ongoing investigation. T. I, 57. Ferrant did not know the form of payment which was used by the individuals to buy their tickets. T. I, 59. Additionally, he indicated that these two individuals did not appear nervous at the time they were stopped. T. I, 59. Ferrant had no idea where Campos and Palomino had been during the approximate four hour time period between the arrival of their flight and the planned departure. T. I, 62. Ferrant did not seize any of the clothing of the individuals, *nor did he find any drugs or narcotics paraphernalia.* T. I, 69-71. *The individuals, Campos and Palomino were not arrested by the officers.* T. I, 71.

The facility where the money was kept after being seized was used by numerous narcotics investigatory agencies, including California State Narcotics, Customs and the Drug Enforcement Administration. T. I, 67.

There were evidence lockers in that office where drugs would be stored if they were seized by any of the agencies using the facilities. T. I, 68.

The officer who searched Ms. Palomino indicated that she also did not have any drugs in her possession. T. I, 83.

Agent Michael Kelly, a Special Agent for the California Department of Justice, continued to confirm the events as they were related in Detective Ferrant's testimony as outlined above. T. I, 90-95, T. II, 4-14. Agent Kelly also expressly indicated that *no narcotics, narcotics paraphernalia or any papers or other indication as to where the money came from was found on either individual.* T. II, 20. Kelly stated that it was his opinion that the money was the result of activity with controlled substances. T. II, 21-24.

Kelly also indicated that neither Campos nor Palomino were arrested for drug trafficking (T. II, 27-28) because "*they hadn't violated any health and safety code in the State of California*".

Agent Kelly also indicated that the various single factors enumerated by him were not conclusive in and of themselves and that Campos and Palomino exhibited certain factors which were inconsistent with narcotics trafficking, to wit; *they were not nervous, they were traveling together, and they did not use false names.* T. II, 29-36. Additionally, the general actions by Campos showed him to be very cooperative with the law enforcement officers. T. II, 40-44.

The canine duty officer, Deputy Joe Lesnick testified concerning a dog sniff of the bundles of money by his dog "Charger". T. II, 57-92. Deputy Lesnick testified that "Charger" could detect the scent of narcotics weeks after the narcotics were at a certain spot. T. II, 61-71-72. Deputy Lesnick also testified that "Charger" could alert positively to a bag of one thousand bills *if only one bill in that bag contained cocaine*, even if the money had not been in the presence of drugs for up to three weeks. T. II, 74. Lesnick testified that the dog could alert to money which had come in contact with drugs, even where no drugs were found. Lesnick also indicated that on the occasions when "Charger" alerted to money where no drugs were found, this money *had never been tested by a lab to determine conclusively whether the drugs were present on the money.* T. II, 72. Where no subsequent laboratory tests were performed, there was no objective, scientific way to prove whether "Charger" was right or wrong other than the officers opinion based upon the investigation. T. II, 73. Charger had only alerted on *one prior occasion* solely to the presence of money. T. II, 67-68.

Deputy Lesnick was asked to check a quantity of money with the dog the morning after it had been seized. T. II, 79. This quantity of money was placed upon the rug on the floor of the office where these numerous other narcotics investigatory agencies were located. T. II, 80. The money was placed in three piles on the carpet and the officer indicated that "Charger" did make a positive alert on all three. T. II, 83-84.

Based upon the alert of the dog, Deputy Lesnick *could not determine when the money was in the presence*

of a narcotics since the odors would linger. T. II, 87. Lesnick also indicated that it could be possible that the odor from a DEA evidence locker could transfer to the currency. T. II, 89. The bay area where the alert to the currency took place had wall to wall carpeting, upon which the piles of currency had been placed. T. II, 91.

The final witness for the Government was DEA Agent Roland Talton, who also provided his opinion that the money was the proceeds of a narcotics transaction. T. II, 101-102. Agent Talton, indicated that he stored the money seized from Campos and Palomino in three DEA evidence bags and placed them into his evidence locker. T. II, 105-106. Talton also indicated that he had not previously kept narcotics in the evidence locker, however, he had seen narcotics previously in this bay area that had not been contained in an evidence bag, but had been in other containers. T. II, 106-107.

Agent Talton was the individual who contacted Deputy Lesnick to arrange for the dog sniff. T. II, 109. Agent Talton confirmed that in a prior deposition in the case, he had indicated that "Charger" had sniffed two of the packages and then started ripping up the third bag. T. II, 119. Talton did not recall "Charger" barking at any of the bags of money, but indicated that "Charger" sniffed the first two bags and then alerted on the third bag. T. II, 122.

Perhaps the most revealing testimony concerning the lack of probable cause regarding the currency's relation to narcotics is found in the examination of Agent Talton. Talton indicated that the money actually came from three sources; some from Campos, some

from Palomino and some from the shoulder bag which Campos was holding. T. II, 116. After counting the money, all of the funds were comingled together on a single desk and the money was merely placed into the three bags for convenience sake. T. II, 116-117. After the dog's alert to only one of these three comingled bags, Talton did not turn the money over to the DEA lab in order to have it tested to confirm in any manner what "Charger" had alerted to, in spite of the fact that the DEA lab had the capability for analyzing the presence of narcotics. T. II, 115-116. Talton also did not seize any of the elastics, corsets, panty hose or any of the other implements which were allegedly used to keep the currency under the clothing of Campos and Palomino. T. II, 115. As to his conclusion that the currency was related to a narcotic's transaction, Talton expressly stated that *he had no idea where the actual narcotics transaction took place, when the narcotics were transferred, to whom the narcotics were transferred nor which type of narcotics were transferred.* T. II, 123-124.

ARGUMENT

I.

THE OPINION OF THE NINTH CIRCUIT COURT OF APPEALS EXPRESSLY AND IMPROPERLY CONFLICTS WITH THAT OF THE FIFTH CIRCUIT COURT OF APPEALS ON THE APPROPRIATE APPLICATION OF THE PROBABLE CAUSE STANDARD TO DETERMINE THE REASONABLENESS OF THE BELIEF THAT A SUBSTANTIAL

CONNECTION EXISTED BETWEEN THE SEIZED MONEY AND ITS ALLEGED EXCHANGE FOR A CONTROLLED SUBSTANCE WHERE NO DRUGS, PARAPHERNALIA OR OTHER EVIDENCE OF A CRIME WAS FOUND.

This action presents the precise situation for review by writ of certiorari contemplated by U.S. Supreme Court Rule 17.1(a) since the opinion set forth in the appendix (App. 1-5) expressly conflicts with the decision in *United States vs. $38,600.00 in U.S. Currency*, 784 F. 2d 694 (5th Cir. 1986) on the same matter. In the instant case, this is not simply a matter which is solely of interest to the parties in this case, but constitutes a real and embarrassing conflict between courts of appeal which has some significant importance to the public. See *Layne Bowlar Corp. vs. Western Wellworks, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 67 L. Ed. 712 (1923). This action involves the government's attempted forfeiture of a large amount of currency (to wit; $630,000.00) where there is no evidence of it having been used or intended to be used in a narcotic's transaction. No drugs, paraphernalia or evidence of a crime was found. The public interest obviously involved is how to safeguard the public from unneccesary and improper seizures and forfeitures at a time when the U.S. government may be taking an overzealous approach to fighting a well-intentioned "war on drugs". However, as the conflict between these two courts of appeals will clearly indicate, the Ninth Circuit Court of Appeals in the instant action went too far in giving the Respondent USA excessive latitude in establishing probable cause for forfeiture.

The facts in *$38,600, supra*, present a situation where an individual was stopped in circumstances strikingly similar to those in the instant case, yet that court expressly found that those facts *failed* to establish probable cause for the belief that the substantial connection existed between the monies seized. The cases are virtually indistinguishable, yet the Ninth Circuit found that the facts were sufficient to establish the required "nexus" between the currency and a narcotics transaction.

The importance of the point on review is outlined at greater length herein; but essentially consists of the need to *distinguish* between the probable cause to stop and search an individual and the probable cause to believe that currency is proceeds from or intended to be used in a narcotics transaction. It is these two distinct standards which were not distinguished in the opinion of the Ninth Circuit below but were directly addressed in *$38,600, supra*.

In *$38,600, supra*, the following factual scenario was developed at trial;

> A vehicle driven by appellant Alvaro Freitas was stopped at the permanent border patrol checkpoint on Interstate 10 near Sierra Blanca, Texas. Border patrol agents Bullock and Steinbrecher were on duty at the time. When questioning Freitas about his citizenship, agent Bullock indicated that he smelled the odor of marijuana emanating from inside the car. The agents referred Freitas to a secondary inspection area and searched the passenger compartment.

> In the back seat, they found a blue nylon travel bag which contained a small pipe bearing marijuana residue, a package of cigarette papers, a small pair of scissors, and a small metal box. The agents then removed the bottom portion of the back seat and discovered *three large manila envelopes containing several rubber-band wrapped bundles of $20, $50 and $100 bills, totalling approximately $38,600 in United States currency.* [e.s.]
>
> * * *
>
> . . .agent Steinbrecher testified that when responding to agent Bullock's questions at the Sierra Blanca checkpoint, Alvaro initially stated that the money was his and that he was enroute to Fort Lauderdale, Florida. Steinbrecher testified that Alvaro asserted later that the money belonged to an uncle in California, whom Alvaro first identified as "Johnny Fernandez" but subsequently referred to as "Carlos Castro" and that Alvaro was to deliver it to his uncle's ranch. Steinbrecher testified that Alvaro then stated that he did not know the exact location of the ranch, that he did not have the phone number and that he would have to call his wife for directions.

$38,600, supra, at 696. The claimant later indicated at the time of trial that he was traveling from his father's ranch in Sacramento, California, to the Dallas area, and that the money was going to be used to purchase horses. The claimant also ". . . admitted that he had no uncle

named "Johnny Fernandez" or "Carlos Castro" and he claimed that he had falsely told border patrol agents that the money belonged to an uncle because at the time he was scared." *$38,600, supra*, at 696.

In the instant case, the factual scenario as determined in the memorandum opinion was as follows:

> The evidence here showed that law enforcement officers knew that Campos and Palomino arrived in Los Angeles on a flight from Miami at 7:00 P.M. and booked a return flight scheduled to depart four hours later. Miami is, of course, a known drug center. The two claimed they had come to Los Angeles to attend a funeral. One officer reasonably viewed this explanation with suspicion because funerals were not generally held at night, the two were not dressed as people normally dress for funerals, and people rarely travel 3,000 miles to stay only a few hours, expecially at the time of bereavement. When Campos and Palomino returned to the airport, they were observed by officers to be dressed differently and to appear to have gained weight; indeed, Palomino appeared pregnant. The two claimed to be married. Campos stated that Palomino was three months pregnant, although she appeared to be much further along. They consented to searches of their personal carry-on luggage. Campos claimed to have $5,000.00 on his person when in fact there was $23,000.00 in the carry-on bag he carried. All of the money was in $100.00 bills. It appeared that the two were Latin American nationals.

> When they consented to body searches, agents found that Campos was wearing a corset containing $334,000.00, and that instead of being pregnant, Palomino was wearing a corset containing $273,000.00. Neither could explain the large sums of money, except to say it belonged to "the company", an entity which neither could identify further . . .

Memorandum opinion at App. 3. Additionally, after the seizure of the currency, the court found that a narcotics-trained dog alerted on it and found that this was not wholly without evidentiary value.

In order to properly place the similarity of the facts in perspective, the following is a side-by-side comparison of the probable cause factors. If anything, the facts in *$38,600.00* were more compelling to require a forfeiture.

INSTANT ACTION	U.S. v. $38,600
EXPORTADORA ET AL. vs. U.S. (U.S. vs $630,000.00)	784 F. 2d 694 (5th Cir. 1986)
(1) The individuals carrying the currency were Latins	The individual carrying the currency was Latin.
(2) The currency was concealed in their clothing.	The currency was concealed in the bottom portion of the back seat of the automobile.
(3) The currency consisted of numerous rubber band-wrapped bundles.	The currency consisted of numerous rubber band-wrapped bundles.

INSTANT ACTION	U.S. v. $38,600
(4) No drugs or any narcotics paraphernalia found on the individuals carrying the currency.	Drugs and narcotics paraphernalia found in the back seat of the automobile driven by the individual carrying the currency.
(5) Individuals transporting the currency were making a round trip between California and Florida.	Individual transporting currency continually evasive concerning his origination and destination, but included claims of travel from California to both Dallas and South Florida.
(6) Individuals transporting currency evasive concerning amount carried and the reason for their trip.	Individual transporting currency evasive regarding purpose of trip and both origin and destination.
(7) Individuals transporting currency indicated that it belonged to "the company".	Individual transporting currency indicated that it belonged to "Johnny Fernandez" then indicated it belonged to "Carlos Castro", both identified as an uncle, but later indicated that neither of those individuals existed and that it belonged to his father.
(8) The individuals did not appear to be nervous at the time they were stopped.	The individual carrying the currency indicated he was scared at the time he was stopped and said that's why he falsely told border patrol agents that the money belonged to an uncle.

INSTANT ACTION	U.S. v. $38,600
(9) A narcotics-trained dog may have alerted to portions of the currency after seizure.	An odor of marijuana was emanating from the inside of the car and marijuana residue, cigarette papers and other paraphernalia were discovered on the back seat above the hidden compartment.
(10) No evidence that the individuals carrying the currency were involved or were suspected of ever having been involved in narcotics transactions.	No evidence that the individuals carrying the currency were involved or were suspected of ever having been involved in narcotics transactions.

As is clearly reflected by the factors listed above, there was certainly no more compelling reason in the instant action to make a probable cause determination than there was in *$38,600.00, supra.* In fact, in light of the actual presence of narcotics and the far more significant evasiveness, there may have been more reason to suspect the individual in *$38,600.00, supra.*

The Ninth Circuit fell into the same trap that Petitioners warned of in their arguments to that Court. They confused the "probable cause" to stop and search with the probable cause to establish a substantial connection to significant criminal activity between the currency and any alleged narcotics violation. *Merely because the actions of the individuals carrying the currency were certainly suspicious and the officers may have even had probable cause to believe that something illegal was taking place, none of this goes to meet the burden placed upon the Government of establishing probable cause to believe that the currency*

was proceeds from or intended to be used in a narcotics transaction. This substantial connection or "nexus" is simply not established by showing a valid reason to stop and question these individuals. There is no doubt but that the individuals should have been stopped and even searched in light of concerns for airline safety where they were obviously carrying something underneath their clothing, but none of this goes to establish the nexus between the currency and a narcotics transaction. *See, United States vs. $364,960 in United States Currency,* 661 F. 2d 319 (5th Cir. 1981).

The Fifth Circuit in *$38,600 in U.S. Currency* addressed this very issue in analyzing the Claimant's position therein which is identical to that in the instant case. In *$38,600 in U.S. Currency,* the analysis proceeded as follows:

> . . . They [claimants] claimed that "the mere fact that Alvaro Freitas had a large sum of money and was headed east on Interstate 10, had a pipe with some marijuana residue in it [and] some rolling papers and did not tell the truth about what he was doing in Texas, does not show more than a mere suspicion" *We agree.*
>
> Under 21 U.S.C. §881(a)(6), the government's initial burden in a drug forfeiture case is to show "*probable cause for belief that a substantial connection exists between the property to be forfeited and the criminal activity defined by the statute; i.e., the exchange of a controlled substance*", *United States v. $364,960.00 in United States Currency, 661 F. 2d 319, 323 (5th Cir.*

> *1981). . . . In the instant case, the district court found that the government sufficiently established probable cause based upon "the quantity of currency seized, the circumstances surrounding the detention and search, and the ambiguity displayed by Alvaro Freitas as to the ownership of the money and the destination of his trip."*
>
> A district court's determination whether the facts adduced at a forfeiture hearing constitute probable cause is a question of law subject to *de novo* review by this Court. Id. at 323n.12. (Emphasis supplied).

$38,600.00 in U.S. Currency at 697. As is apparent from the above excerpt, the district court in *$38,600.00, supra,* used precisely the same factors as were enumerated in the district court and memorandum opinion in this case. It is at this point where the opinions substantially diverge and simply cannot be reconciled absent review by certiorari in this Court. The court in *$38,600.00, supra,* reached its holding as follows, at 697-699.

> Probable cause in a forfeiture proceeding may be established by circumstantial evidence. *$364,960.00 in United States Currency,* 661 F. 2d at 324-25. Moreover, the discovery of a large amount of money unexplained, can constitute evidence that the money was furnished or was intended to be furnished in return for drugs. *Id.* at 324. Thus, a large amount of money found in combination with other persuasive circumstantial evidence, particularly the

presence of drug paraphernalia, is frequently held sufficient to establish probable cause. *See, United States vs. $22,287.00 in United States Currency,* 709 F. 2d 442 (6th Cir. 1983) (money, heroin, scales, guns were found in search after drug sale arrest). Here, in addition to the $38,600.00 discovered concealed under the back seat in Alvaro Freitas' vehicle, the district court's probable cause determination was apparently based upon two other factors: (1) The border patrol agents' discovery of a pipe bearing marijuana residue, cigarette rolling papers, a small pair of scissors, and a small tin box, and (2) Alvaro's persistent evasiveness and inconsistency when responding to the agents' questions concerning his destination and the identity of the owner of the money. *There seems little question that this evidence, when considered collectively, gives rise to a strong suspicion, perhaps even probable cause, of some illegal activity. It is not quite so apparent, however, that these facts give rise to a reasonable belief, supported by more than mere suspicion, that Alvaro Freitas furnished, intended to furnish, or had furnished the money in exchange for drugs.*

A review of pertinent authority reveals that in the context of 21 U.S.C. §881(a)(6), other courts faced with making a probable cause determination have been presented with stronger circumstantial evidence of narcotics activity than is present in this case. The distinguishing factor in the instant case seems to be that

except for the large amount of money discovered in Alvaro Freitas' car, there is little evidence linking Alvaro's possession of the money to a controlled substance exchange. Border patrol agents did not find drugs, and at trial the government presented no evidence indicating that Alvaro had ever been involved or was suspected of ever having been involved in narcotics transactions. Moreover, the discovery of a pipe bearing marijuana residue and rolling papers, while relevant, is certainly not as compelling as the evidence presented in the many other reported cases which disclosed that *the defendants had either admitted the money's intended purpose or could be linked to narcotics transactions by testimony of past drug-related activities, more incriminating paraphernalia, or the discovery of actual drugs. See, $364,960.00* [*supra*] (cocaine, 32 caliber pistol with an attached silencer, small envelope containing hashish, pharmacist's scales, plastic baggies bearing visible traces of cocaine, and three suitcases containing $364,960); *United States vs. $84,000.00 in United States Currency*, 717 F. 2d 1090, 1098, 1099-1100 (7th Cir. 1983), *cert. denied, subnom, Holmes vs. United States* ____ *U.S.* ____, 105 S. Ct. 191, 83 L. Ed. 2d 71 (1984) (defendants found to be carrying $84,000.00 under clothing in airport, admitted that their baggage contained cocaine and marijuana and signed written statements indicating that the money was to be used to purchase marijuana); *United States vs. $2,500.00 in United States Currency*, 689 F. 2d 10, 16 (10th Cir. 1982), *cert.*

denied, sub-nom, Aponte vs. United States, 465 U.S. 1099, 104 S. Ct. 1591, 80 L. Ed. 2d 123 (1984) (defendant found with $2,500 cash, surveillance revealed no other apparent explanation, defendant recently sold DEA agent $16,000.00 worth of heroin and offered to sell more, money discovered with a note pad of recorded drug transanctions); *United States vs. $93,685.61 in United States Currency*, 730 F. 2d 571, 572 (9th Cir.) *cert. denied, Willis vs. United States*____U.S.____, 105 S. Ct. 119, 83 L. Ed. 2d 61 (1984) (information that claimant was currently engaged in drug transactions, documents disclosing his past drug trafficking involvement, large amount of cash found in home, absence of evidence of legitimate employment, claimant's failure to file tax returns, rifles found at claimant's house); *United States vs. $13,000.00 in United States Currency*, 733 F. 2d 581, 585 (8th Cir. 1984) (defendant observed at airport carrying shoulder bag later discovered to contain $13,000.00 in plastic bags, tape and rubber bands—materials used by narcotics violators—and defendant recently placed a number of toll calls to a residence which he had frequently contacted prior to his earlier cocaine distribution arrest).

We find that the $38,000 discovered in Alvaro Freitas car, even when considered in conjunction with a pipe and rolling papers and Alvaro's evasiveness concerning his destination and the money's owner, is insufficient to sustain the district court's finding. *As we have earlier*

suggested, this evidence may very well give rise to a reasonable belief that there exists a connection between the money seized and some illegal activity; here, however, the evidence gives rise only to a suspicion of a connection between the money seized and its use in a transaction for a controlled substance. (Emphasis supplied).

Similarly, in the instant case, the "suspicious" circumstances certainly warranted "suspicion". However, there was *nothing* which connected the currency with any form of narcotics transaction. There was no evidence of any drugs or narcotics paraphernalia, nor was there any indication that these individuals had previously been suspected of, or investigated for, drug related activities. The instant case is even less compelling to establish a reasonable suspicion than those facts found in *$38,600.00, supra;* and certainly does not establish probable cause to believe that the currency was proceeds from or intended to be used in a *narcotics transaction.* The cases are virtually indistinguishable.

The Court must recognize that in the context of forfeitures, these are drastic remedies which are not favored by the courts. Forfeitures should only be enforced where the facts established clearly present grounds for forfeiture both within the letter and spirit of the law. See, *Bramble vs. Kleindienst,* 357 F. Supp. 1028 (D. Col. 1973), *affirmed,* 498 F. 2d 968, *cert. denied,* 419 U.S. 1069, 95 S. Ct. 656, 42 L. Ed. 2d 665; *see also, Kane vs. McDaniel,* 407 F. Supp. 1239 (W.D. Ky. 1975). It is a drastic remedy which should not be imposed based upon what amounts to nothing more than a suspicion or "hunch".

In order to create the initial required probable cause for the forfeiture of property which is not contraband on its face, the government must establish a *substantial connection* of the subject res with *significant criminal activity. See, U.S. vs. U.S. Coin and Currency,* 401 U.S. 715, 91 S. Ct. 1041, 28 L. Ed. 2d 434 (1971); *U.S. vs. 1972 Datsun,* 378 F. Supp. 1200 (D.C. N.H. 1974); *U.S. vs. $64,000.00,* 722 F. 2d 239 (5th Cir. 1983); *U.S. vs. Jenison,* 484 F. Supp. 747 (D.R.I. 1980). There cannot be a forfeiture absent specific evidence of unlawful conduct since the minimum necessary for a forfeiture is *some showing of a violation of law. See, McClendon vs. Rosetti,* 460 F. 2d 111 (2d Cir. 1972); *U.S. vs. Decker,* 322 F. Supp. 419 (W.D. Mo. 1970). This required substantial connection must go beyond simply arousing suspicion and must actually establish a nexus between the property sought to be forfeited and the criminal activity. *See, U.S. vs. $22,287.00,* 709 F. 2d 442 (6th Cir. 1983); *See also, U.S. vs. $364,960 in U.S. Currency,* 661 F. 2d 319, 323 (5th Cir. 1981).

In recognizing this significant distinction between contraband per se and derivative contraband, the Court in *One 1972 Datsun, supra,* stated;

> . . . Forfeiture statutes such as 21 U.S.C. §881(a)(4), which authorized seizures of derivative contraband (i.e. articles which are not "intrinsically illegal in character", but derive their contraband status only from their association with criminal activity) must be strictly construed. Unlike the seizure of per se contraband, "the possession of which, without more, constitutes a crime", and the seizure of

which directly promotes the remedial goals of a forfeiture scheme, seizure of derivative contraband may or may not be remedial, depending upon the nature and substantiality of its association with the underlying illegal activity. *One 1958 Plymouth Sedan vs. Pennsylvania*, 380 U.S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965). Therefore, it is important to require that derivative contraband be *substantially and instrumentaly connected with illegal behavior* before it is subject to forfeiture. Otherwise, the government, by electing to proceed against suspects via the forfeiture route, could deprive citizens of the constitutionally mandated safeguards which surround the criminal process. *Boyd vs. U.S.*, 116 U.S. 616, 6th S. Ct. 524, 29 L. Ed. 746 (1886). *See, generally cases cited in 25 Modern Federal Practice Digest, Forfeiture* §1 (1960); *United States vs. One 1951 Oldsmobile Sedan, supra.*, 126 F. Supp. at 516; *Coin and Currency, supra.* 401 U.S. at 717-722. (Emphasis supplied).

One 1972 Datsun at 1206.

In light of this requirement that the government show some substantial connection with significant criminal activity going beyond mere suspicion and actually creating a nexus between the property and the criminal activity, the evidence presented at the trial of this case and as analyzed by the Ninth Circuit Court of Appeals was sorely deficient. The officers merely stated that the actions of Campos and Palomino were consistent with actions of drug couriers, yet their testimony belies this conclusion. This amounts to nothing more than the

arousal of suspicion which was prohibited by *U.S. vs. $22,287.00* and *$38,600.00, supra* as a basis for the creation of the requisite probable cause. There was no nexus between the currency and the criminal activity suspected since the officers specifically indicated that *they could not tell when the alleged transaction took place, where it took place or who was involved.* Additionally, they could not identify any drug paraphernalia and indicated the individuals were not under investigation or otherwise suspected of any crime.

In the memorandum opinion of the Ninth Circuit, the primary case relied upon by the court was *United States vs. $93,685.61 in U.S. Currency,* 730 F. 2d 571 (1984), *cert. denied,* 105 S. Ct. 119. The facts found in that case underscore the requirement of a substantial connection to significant criminal activity which is conspicuously absent in the instant case. In *U.S. vs. $93,685.61, supra.*, the court reversed a summary judgment which had been entered in favor of the claimants where Drug Enforcement Administration agents had found, in addition to the currency sought to be forfeited, cocaine, heroin, items of false identification, including a birth certificate with the claimant's fingerprints on it, bullets, powder scales, glassine bags, a zip lock bag with cocaine residue in it and various other drug paraphernalia. Additionally;

> The government contended that probable cause for forfeiture existed based on the following; (a) an anonymous tip to a Drug Enforcement Administration agent that the claimant was engaged in drug transactions currently; (b) claimant's documented involvement in drug transactions in 1978; (c) claimant's fingerprints

> on the intercepted birth certificate; (d) the fact that the amount of cash found in a search of claimant's home was so large; (e) the drug paraphernalia found in the same room as the money; (f) absence of evidence during the search that the claimant engaged in any legitimate employment; (g) claimant's failure to file tax returns; (h) rifles found in claimant's house.

U.S. vs. $93,685.61, supra at 572.

In the instant case, the officers specifically indicated that the Claimants and Campos and Palomino *were not the subject of any investigation and/or tip. Additionally, no paraphernalia or any other evidence of any kind whatsoever was found on Campos or Palomino at the time of the seizure.* Therefore, the only remaining factor is the existance of a large sum of money; a circumstance as consistent with innocent behavior as with any other actions merely suspected by the government's agents. It was not unreasonable to expect individuals carrying such large amounts of currency to attempt to conceal the funds to prevent theft.

The court in *$38,600, supra*, in recognizing the constitutional parameters requiring strict construction, was able to draw significant distinctions between the facts in that case and those in the numerous other far more compelling cases listed therein. The instant case is simply one where the Court was not presented with the stronger circumstantial and/or direct evidence of narcotics activities which is required to order a forfeiture. The drastic remedy of allowing a forfeiture of $630,000.00, must not be imposed unless the facts are clearly within the "letter and spirit" of the law.

CONCLUSION

The overbreadth of the Ninth Circuit's opinion and its impact cannot be under-emphasized. If such a decision is allowed to stand, any latin individual carrying concealed currency to Miami would have that currency subject to forfeiture. This goes well beyond both the letter and spirit of the forfeiture statute. The court in *U.S. vs. $38,600.00 in U.S. Currency, supra*, properly applied the probable cause standards to the reasonableness of the belief that the currency was proceeds from or intended to be used in a narcotics transaction. In that case the Fifth Circuit did not confuse probable cause to stop and search with probable cause to forfeit. In fact, the Fifth Circuit expressly recognized that distinction. This crucial distinction was not made in the opinion of the Ninth Circuit below and therefore mandates review by certiorari to correct this injustice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 3 day of Dec., 1986 to: ROBERT C. BONNER, U.S. Attorney, Civil Division; FREDRIC M. BROCIO, AUSA, Chief Civil Division and JAMES STOTTER, III, ESQ., AUSA, 1100 United States Courthouse, 312 N. Spring Street, Los Angeles, California 90012 and SOLICITOR GENERAL, Department of Justice, Washington, D.C. 20530.

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By: _____
SCOTT A. SILVER, ESQUIRE

STATE OF FLORIDA)
)SS
COUNTY OF DADE)

SWORN TO AND SUBSCRIBED before me the undersigned authority this 3rd day of December, 1986.

_____
NOTARY PUBLIC, State of Florida

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. JAN 30,1990
BONDED THRU GENERAL INS. UND.

Appendix

[FILED JUN 19 1986]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 85-5541
DC No. CV 83-7988

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

$630,000 in U.S. Currency,
Defendant.

EXPORTADORA COLOMBIANA DE EMERALDES CO., LTD. and JOSE TOMAS VARGAS ORTIZ,
Claimants-Appellants.

Appeal from the United States District Court
for the Central District of California
Honorable Edward Rafeedie, District Judge, Presiding
Argued and Submitted December 2, 1985—Pasadena, California

MEMORANDUM*

Before: FLETCHER, PREGERSON and CANBY, CIRCUIT JUDGES

*This disposition is not appropriate for publication and is not to be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Exportadora Colombiana de Emeraldes Co., Ltd. and Jose Tomas Vargas Ortiz appeal a judgment of forfeiture entered against the defendant currency pursuant to 21 U.S.C. §881(a)(6). The sole contention on appeal is that the government failed to establish probable cause that the currency derived from or related to narcotics activities. Because we find that the government did establish probable cause, we affirm.

In *United States v. $93,685.61 in U.S. Currency*, 730 F.2d 571, 572 (9th Cir.) (per curiam), *cert. denied*, 105 S. Ct. 119 (1984), we explained the probable cause standard in civil forfeiture cases.

> The government can show probable cause for a belief that the currency is subject to forfeiture based on a reasonable ground for belief that the currency was furnished or intended to be furnished in exchange for drugs. This belief must be more than mere suspicion, but can be created by less than prima facie proof.

See also United States v. One 56-Foot Motor Yacht Named Tahuna, 702 F.2d 1276, 1281-82 (9th Cir. 1983). Once the government established probable cause to forfeit, the burden of proof shifts to claimants to show that the property is not forfeitable. 19 U.S.C. §1615.

We review a district court's probable cause determination in a forfeiture proceeding *de novo* as a question of law. *United States v. 1982 Yukon Delta Houseboat*, 774 F.2d 1432, 1434 (9th Cir. 1985). Here, we must examine whether the govenment had reasonable

grounds to believe the currency was narcotics-related. We find that reasonable grounds existed both at the time of seizure and at the time of trial.

The evidence here showed that law enforcement officers knew that Campos and Palomino arrived in Los Angeles on a flight from Miami at 7 p.m. and had booked a return flight scheduled to depart four hours later. Miami is, our course, a known drug center. The two claimed they had come to Los Angeles to attend a funeral. One officer reasonably viewed this explanation with suspicion because funerals are not generally held at night, the two were not dressed as people normally dress for funerals, and people rarely travel 3000 miles to stay only a few hours, especially at a time of bereavement. When Campos and Palomino returned to the airport, they were observed by officers to be dressed differently and to appear to have gained weight; indeed, Palomino appeared pregnant. The two claimed to be married. Campos stated that Palomino was three months pregnant, although she appeared to be much further along. They consented to searches of their purse and carry-on luggage. Campos claimed to have $5000 on his person, when in fact there was $23,000 in the carry-on bag he carried. All of the money was in $100 bills. It appeared that the two were Latin American nationals. When they consented to body searches, agents found that Campos was wearing a corset containing $334,000, and that, instead of being pregnant, Palomino was wearing a corset containing $273,000. Neither could explain the large sums of money, except to say it belonged to "the Company," an entity which neither could identify further. We conclude that, on the basis of the above information, the officers had probable cause to seize the currency.

After seizure of the currency, a narcotics-trained dog alerted on it. While claimants attack the probity of this alert, it was not wholly without evidentiary value. Testimony at trial also indicated that the statement of Campos and Palomino that they were married to each other was false. We reject claimaints' contention that this evidence cannot be considered for the purpose of establishing probable cause for the forfeiture action because it was discovered after the initial seizure. It is only evidence resulting from or tainted by an illegal seizure that is inadmissible. *United States v. One (1) 1971 Harley-Davidson Motorcycle*, 508 F.2d 351, 351 (9th Cir. 1974) (per curiam); *John Bacall Imports, Ltd. v. United States*, 412 F.2d 586, 588 (9th Cir. 1969). Because claimants do not challenge the legality of the initial seizure, the post-seizure evidence was properly considered. It is encumbent on the government to show at the time of trial probable cause for the forfeiture, and on the district court to make a finding as to whether there is probable cause at that time. Evidence developed after the initial seizure may be relevant and probative as to whether probable cause exists at the time of trial. It could either enhance or detract from the government's showing of probable cause.

We find that the "aggregate of facts in this case gives rise to 'more than mere suspicion,' " *$93,685.61*, 730 F.2d at 572, and was sufficient to support a district court's finding of probable cause to forfeit. Circumstantial evidence can support a finding of probable cause. *See id.* Moreover, the large sum of money found on the two couriers, all in $100 bills, is itself highly suggestive of drug-related activities. *See id.*

Once the government made its showing of probable cause, claimants had a full opportunity to present their explanation of the events of October 18, 1983, as well as the source of the $630,000. The jury properly could, and apparently did, disbelieve claimants' story that the money derived from the sale of emeralds. The judgment of forfeiture is AFFIRMED.

[FILED OCT 21 1986]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 85-5541
DC No. 83-7988

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-v.

$630,000.00 in U.S. CURRENCY,
Defendant,

EXPORTADORA COLOMBIANA DE EMERALDES CO. LTD.; and JOSE TOMAS VARGAS ORTIZ
Claimants-Appellants.

ORDER

BEFORE: FLETCHER, PREGERSON AND CANBY, CIRCUIT JUDGES.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion of rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge has requested a vote. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.